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Supreme Court, U.S.
FILED

08-73 JUL 14 2008

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No. 07-_____

In the Supreme Court of the United States

CONNIE C. RESHARD,

PETITIONER,

VERSUS

MAIN LINE HOSPITALS INCORPORATED d.b.a./a.k.a., MAIN LINE HEALTH AND THE LANKENAU HOSPITAL, DR. MICHAEL J. GLASSNER, DR. JOHN F. SCHILLING, MARK E. SCOTT, D.O., DR. KIMBERLY M. LENHARDT, DR. THOMAS J. MEYER, PULMONOLOGY ASSOCIATES, INC., AND DR. GEOFFREY P. TREMBLAY,

RESPONDENTS.

ON PETITION FOR A WRIT OF CERTIORARI FROM THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR CERTIORARI

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QUESTIONS PRESENTED

i. Whether Rule 41(b), Fed. R. Civ. P. dismissal for failure to prosecute is reversible, in part, due to errors committed under Rule 26(b)(1) and (2), *et seq.* and due to inconsistent standards.

ii. Whether the same standards for a lay *pro se* litigant should be applied to an attorney *pro se* litigant.

iii. Whether the court erred by denying motion for default judgment and the striking of pleadings because the defendants deliberately failed to file timely answers to the Complaint.

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JURISDICTION

On November 29, 2007, the United States Court of Appeals for the Third Circuit (Hereinafter "Third Circuit") issued an Order affirming the district court dismissal with prejudice for failing to prosecute under Rule 41(b), Fed. R. Civ. P., C.A., No. 06-3170. (App.-1). On February 13, 2008, the Third Circuit sitting *en banc* denied the petition for rehearing. (App.-6). The Third Circuit had jurisdiction under 28 U.S.C. § 1291.

This Court may entertain jurisdiction of a final order of the United States Court of Appeals pursuant to Section 1254 of Title 28 of the United State Code.

I. COURSE OF PROCEEDINGS

Petitioner filed this lawsuit in the United States District Court for the Eastern District of Pennsylvania on April 2, 2002 under the diversity of citizenship jurisdiction, 28 U.S.C. § 1332, requesting monetary damages from the named respondents listed in the style of the case. The United States District Court for the Eastern District of Pennsylvania (Hereinafter "District Court") dismissed the case for failure to prosecute under Rule 41(b), Fed. R. Civ. P., on April 28, 2006, Civil Case No. 02 cv1787. (App.-8). The District Court denied the motion for reconsideration on May 26, 2006.

After timely service of the Complaint and Summons and the Amended Complaint, Dr. Michael Glassner, a Gynecologist (Hereinafter, Dr. Glassner"), Dr. Thomas Meyer, a Pulmonologist (Hereinafter "Dr. Meyer"), Dr. Geoffrey Tremblay, a Cardiologist (Hereinafter, "Dr. Tremblay"), Dr. John Schilling, an Intervention Radiologist (Hereinafter, "Dr. Schilling") and Dr. Mark Scott, an Intervention Radiologist (Hereinafter, "Dr. Scott"), none of the parties filed a timely Answer or a Rule 12(b), Fed. R. Civ. P. Motion within 20 days. Counsel for Dr. Glassner, Dr. Meyer and Dr. Tremblay entered appearances. Each of the defendants (excluding Dr. John Schilling and Dr. Mark Scott) in the case sought to begin discovery without a stipulation of the parties and without district court approval under Rule 26(d), Fed. R. Civ. P. None of them filed a

timely Answer, except Dr. Kimberly Lenhardt (Hereinafter, "Dr. Lenhardt") and Lankenau Hospital (Hereinafter, "Hospital") filed timely Rule 12(b), Fed. R. Civ. P. motions. Petitioner served on August 20, 2002 a motion for default judgment against all of the parties except Dr. Lenhardt and the Hospital. The respondents made various filings after the motion for default. Senior District Court Judge Robert E. Kelly denied the motion on September 13, 2002. *App.*at *21-23.*

All of the parties were allowed to file an Answer. Dr. Michael Glassner filed a Rule 12(b) motion to dismiss and for a more definite statement. The District Court denied the Rule 12(b) motions filed by Dr. Glassner, Dr. Lenhardt and the Hospital on October 21, 2002. The remaining parties filed a timely Answer except Dr. Lenhardt and the Hospital filed their Answer and a motion for summary judgment under Rule 56(B) Fed. R. Civ. P. on December 3, 2002. Dr. Geoffrey Tremblay also filed a motion for summary judgment under Rule 56(B). The district court also set discovery to end by March 31, 2003, but did not hold a conference with the parties first under Rule 26(f), Fed. R. Civ. P. Also, the Hospital and Dr. Lenhardt moved to compel discovery on December 20, 2002 regarding unauthorized discovery request under Rule 26(d), commenced in August 2002 that exceeded the scope of initial disclosures under Rule 26(a)(1).

On January 24, 2003, Judge Kelly held a status conference, noting that petitioner is an attorney. Subsequently, the court also granted petitioner's motion to extend the discovery timeline. All parties served discovery requests including a

request for petitioner's deposition. Petitioner served a request to depose Dr. Lenhardt's in February 2002. Neither deposition was held as scheduled. Petitioner had chest pains and was admitted to a local DC hospital. The respondents did not want to hold Dr. Lenhardt's deposition in the jurisdiction of her residence, Northern Virginia. The district court re-scheduled depositions for Dr. Lenhardt on March 13, 2003 (but district court on March 18, 2003, set it for March 20, 2003 in Philadelphia) and for petitioner on March 31, 2003 in Philadelphia. Petitioner filed on March 25, 2003, a motion for co-counsel to represent her at her deposition and the district court denied it on March 27, 2003. Petitioner filed a motion on March 28, 2003 for Hughie Hunt to appear *pro hac vice*. The district court refused to consider it in time for the deposition. Petitioner filed a notice of appeal on March 31, 2003, C.A. No. 1899. Petitioner appeared for her deposition but did not answer questions without an attorney to represent her.

Petitioner had previously filed a petition for writ of mandamus with the Third Circuit (C.A. No. 03-1623 on March 5, 2003) that would be denied on May 6, 2003. Both sides (regarding discovery) filed various other motions. In response to a motion for recusal by petitioner, Senior Judge Kelly recused himself on April 16, 2003. All respondents filed a series of motions regarding a protective order and motions for summary judgment. Subsequently, the case was reassigned on April 22, 2003 to Judge R. Barclay Surrick. On October 15, 2003, Judge Surrick dismissed without prejudice most of the pending motions on both sides and scheduled a hearing for November 24, 2003. At that hearing, Judge Surrick

discussed issues on whether petitioner could have an attorney despite the fact that the appeal was pending in the Third Circuit on that issue. Judge Surrick would also require that petitioner provide a certificate of merit despite the fact that petitioner's medical records were both incomplete and otherwise modified.

On November 26, 2003, Judge Surrick ordered petitioner to inspect the medical files at Lankenau Hospital by December 9, 2003 despite petitioner's protest that electronic discovery could not be conducted under such a short window. *App.* at 19-20. None of the preliminary discovery necessary before an inspection process could begin had been completed by the Hospital and the timeline was impossible to undertake the task. Judge Surrick's order stated that there was no discretion. Petitioner filed on February 9, 2004, a companion appeal with the Third Circuit, C.A. No. 04-1273. Judge Surrick held a hearing on February 20, 2004 and he indicated according to the hearing transcript that he would hold another status hearing before taking any further action. Petitioner did not attend the February 20 hearing. The Third Circuit denied both pending appeals on November 16, 2004. Judge Surrick elected not to hold a subsequent status hearing and filed an order dismissing the case on April 28, 2006, under Rule 41(b) and a companion local rule.

II. STATEMENT OF FACTS

On April 4, 2000, the plaintiff entered Lankenau Hospital's ambulatory facility for a transvaginal myomectomy. The surgery was incomplete and the patient suffered major life threatening complications, requiring admission for further observation.

Petitioner was told during recovery that there were complications involving blood loss leading to transfusion of two pints of blood and that she would be admitted for observation. The patient had debilitating pain. Later that same day the patient was given an experimental procedure, uterine artery embolization including the unauthorized embolization of her right ovary. There was no valid informed consent for the procedure. None of her physicians advised her of the ovary embolization or that her ovary embolization was intentional. *See Generally, Complaint as amended.*

The plaintiff was not adequately monitored. On April 6, 2000, the nurses ignored the patient during chest pain and acute breathing distress. Her caregivers told her that she was disturbing other people, to shut up and breath through her nose. At that time, blood clots were traveling through her veins, her heart and finally into her lungs. No doctor examined her or did any follow-up communication. Impaired breathing was noticeable thereafter but ignored by all of her caregivers. *See Generally, Complaint as amended.*

Two days later on April 8, 2000 the patient had another clot. Her condition grew worse. The patient was being released on April 8, 2000, but she

telephoned Dr. Glassner complaining that there had to be something wrong with her because she had pain, heavy breathing and was too sick to go home. A resident doctor of Asian descent came to see her shortly afterward the telephone conversation with Dr. Glassner, learned that she would stay in the hospital another day and left petitioner without communication or examination. After near collapse later on April 8, 2000, the patient was placed on oxygen therapy that night but no doctor attended to her all night. *See Generally, Complaint as amended.*

On the morning of April 9, 2000, the same resident doctor of Asian descent completed a discharge form, gave her several prescriptions and told the patient that there was nothing wrong with her. Until April 9, 2000, none of her physicians saw her and Dr. Glassner and Dr. Schilling never actually examined the patient, only resident doctors. A CT Scan of the chest revealed multiple large clots in both lungs, although the patient was told she had pulmonary embolus, one clot. Apparently, the blood clots were caused by the embolization procedure but the medical record does not reflect the origin and location of the clots. Dr. John Schilling who performed the embolization also inserted a permanent Greenfield filter in the patient's inferior vena cava on April 10, 2000. *See Generally, Complaint as amended.*

The patient spent April 9-12, 2000 in an intensive care unit, was given intravenous blood thinners, Heparin, was given 5 pints of blood consecutively on the 9th, and was given oral blood thinner, Coumadin thereafter. Because of blood pressure issues as a result of the pulmonary emboli,

the patient began what has become a lifetime requirement of calcium blockers for systemic and secondary pulmonary hypertension as well as regurgitating mitral, aortic and bicuspid valves. From April 12th- 18th the patient was in a cardiac monitoring floor. She left the Hospital on discharge with a blood stream infection and a temperature of 103 degrees Fahrenheit. *See Generally, Complaint as amended.*

The patient continued taking various narcotics for pain for several months and anticoagulation drugs for over a year. On April 22, 2000, the patient entered a local hospital in Washington, DC for further treatment for several weeks and spent several weeks with at home nurse care with varied intravenous medications. While hospitalized in Washington during this period, she was said to have a partially collapsed lung, cardio-pulmonary issues including partial pulmonary infarction and blood stream infection. The transvaginal myomectomy was completed on May 31, 2000 at a hospital in Washington, DC. The patient endures permanent impairment as previously noted as well as premature, complete loss of ovary function and other permanent impairment not to mention pain and suffering. *Complaint as amended.*

The patient, a 52-year old female entered Lankenau Hospital in good health and could be described as an appearance of a thirty something year old, both medically and physically. Other than the fibroid tumors and anemia, the patient had no other medical conditions. The patient beginning in her twenties practiced good physical exercise and ate a balanced, low fat diet consisting of seafood, fruits,

vegetables and limited red meats and poultry. She had no hypertension, no heart valve problems, no heart murmur, no diabetes, no kidney disease, no pulmonary disease, and no propensity to blood coagulation or other disease. *See Generally, Complaint as amend.* She now has issues with most of the medical conditions listed.

III. INTRODUCTION AND SUMMARY OF ARGUMENT

The medical malpractice area presents an extraordinary legal practice environment. It is governed by high expense and almost always requires medical expert testimony. It is extremely difficult to secure medical experts because the vast majority of medical experts are unwilling to give testimony against another member of the medical community. Therefore, it is extremely difficult to secure legal representation, leading to the non-filing of many legitimate cases of medical malpractice.

In 1999, a National Academy of Sciences' Institute of Medicine study stated that nearly 99,000 Americans die each year as a result of hospital errors. *Learning From Malpractice Claims About Negligent, Adverse Events in the United States*, National Academy of Science, Institute of Medicine, 1999; *see also, Chunliu Zhan, MD and Marlene Miller, "Excess Length of Stay, Charges, and Mortality Attributable to Medical Injuries During Hospitalization*, 290 JAMA, 14, 1868-1874 (October 2003). It noted that the number of deaths surpassed highway deaths, breast cancer deaths or AIDs deaths.

Yet it appears that judges are giving hospitals deference beyond what is fair to all parties involved and beyond what is permitted under Rule 26, Fed. R. Civ. P. regarding the discovery of medical records. Many errors that may occur are routinely recorded in computer systems that are more difficult to conceal if electronic discovery is not permitted, *e.g.*, after surgery, pain medication routinely computer administered, CT scans are computerized but not all images are made available. Access to electronic data in such cases is essential but not permitted in this case. Rule 26 (b) (2), Fed. R. Civ. P. now expressly provides for electronic discovery under the most recent amendments. Prior language in Rule 26 could reasonably be interpreted as inclusive of full and complete electronic discovery. Unfortunately in this case, the petitioner was not permitted to undertake electronic discovery through routine discovery channels, even after demonstrating that the probability of the validity of the hard copy medical records of the plaintiff were not made available to her and could not be considered materially true and correct. Still the district court judge stopped all discovery and requested the plaintiff to provide a certificate of merit based upon an incomplete and inaccurate set of medical records that appears inconsistent with federal and state procedures. Electronic discovery was by far the superior method of discovery available to the petitioner that would either give her access to a complete and accurate record or allow her to obtain corroboration that her medical record had been sabotaged or otherwise, sanitized. How was petitioner expected to provide a certificate of merit based on a false record?

Respondent Hospital could not be prejudiced by any delay since it had custody of the primary evidentiary record that would either confirm its negligence or exonerate it.

There are valid reasons why a litigant would elect to proceed *pro se*. First of all the window of opportunity for filing lawsuits under a theory of negligent medical practice is short, two years in the state of Pennsylvania and many other jurisdictions. Second, the ability of a putative litigant to obtain legal representation is often difficult to secure in time to file the case before the statute of limitation expires. In my case, I suspected that a lawyer sold certain parts of the medical records in my possession to the other side when the same parts of my medical record disappeared from the set he returned to me as time ran out and a similarly abridged set was offered by the Hospital produced at Dr. Lenhardt's deposition. I believe that equal access to discovery is an essential component of federal discovery that should be preserved in this case. The Third Circuit should have required the application of the new provisions for electronic discovery under the Federal Rules for Civil Discovery. Instead, the Third Circuit affirmed the dismissal of the case for failure to prosecute.

A review of the standards applied in failure to prosecute cases by other Circuits shows a degree of disparity that has lead to uneven disposition of cases in the past and would lead to uneven disposition of cases in the future. Our Constitution guarantees all citizens due process of law and equal protection under law. It is certainly important to the judiciary

and in the public interests to apply more uniform principles among the Circuits.

The right to proceed *pro se* is a fundamental right. There should be one set of rules for all *pro se* litigants. I am a member of the legal community. I filed the case, *pro se*, as permitted to all litigants under Section 1654, Title 28, U.S.C. Historically, the right to proceed *pro se* long existed in the common law and was codified in the very first Judiciary Act of 1789 under our Constitution. The rule in federal courts is to treat *pro se* litigants less strict than lawyers in a representative capacity. When the *pro se* litigant is also a lawyer, is it fair to treat the *pro se* litigant as if he or she is a lawyer in a representative capacity substantively while treating he or she as a lay *pro se* litigant for procedural matters, *e.g.*, prohibiting the use of co-counsel during the taking of her deposition? By not docketing the *pro hac vice* appearance of co-counsel, the plaintiff was not permitted to provide her deposition on an equal basis with the other parties to the litigation proceeding with counsel in a representative capacity. Yet the district court and the Third Circuit relied heavily upon my legal status in their assessment of the case and ultimately in their dismissal of the case for failure to prosecute. I believe this presents a significant question for this Court.

Based upon the information presented herein, petitioner urges the Court to grant a *writ of certiorari* to the Third Circuit in this case on all issues presented.

IV. ARGUMENT

Under Rule 10 (a) of the Supreme Court Rules, this Court may grant a *writ of certiorari* when a United States Court of Appeals issues a decision that is in conflict with the decisions in other Circuits. Petitioner asserts that the ruling in this case is inconsistent with decisions in the District of Columbia Circuit, the Second Circuit and the Ninth Circuit. Each Circuit requires notice and notice alone would distinguish their decisions from the decision in this case. The Third Circuit states that notice to the litigant is not a requirement before dismissal of the case. *App.* at 3.

Inherent in all actions of dismissal is both due process of law and equal protection under law, rights guaranteed by the Constitution of the United States of America. *See Fifth, Fourteenth Amendments.* Here, the district court on October 15, 2003, suspended a series of allegations and counter-allegations filed by both sides during the course of discovery. Yet, both the district court and the Third Circuit advocate that it is the petitioner's fault for every thing that happened in the case. *App.* at 2-5, 8-13.[1]

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[1] In a subsequent hearing on November 25, 2003, Judge Surrick undertook to handle the issue of co-counsel even though it was still pending before the Third Circuit. He decided based upon my appearance that there was not anything medically wrong with me so no further discovery should occur until the plaintiff produced a certificate of merit. ***EMPHASIS ADDED.*** Plaintiff told Judge Surrick about the problems with the medical records for her, particularly the records in the possession of the Hospital, citing the record in the deposition of Dr. Lenhardt who confirmed in part what the plaintiff already knew that the records were not a materially true and complete

When the Hospital alters the medical records of Connie Reshard including electronic records, the district court sends the plaintiff to the hospital for an inspection and a production that was to take place by December 9, 2003, **a window of opportunity of 10 calendar days**. Without the computer forensics for electronic documents, this process was certain to fail since Judge Surrick stated that his order in the matter was final and could not be changed, "The above deadlines will not be extended for any reason." *App.* at 21. Plaintiff did not have time to sign contracts with the forensic expert, indemnify their company and spend thousand of dollars when the Hospital had not provided the forensic interrogatories submitted to the Hospital during early 2003 laying the foundation for the computer system framework, servers, location of storage and

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representation of what happened at the Hospital between April 4, 2000 and April 18, 2000. Paul Wright, the Counsel for the Hospital at the Lenhardt deposition stated that the records he produced were the final and complete medical records in issue for Connie Reshard. I cannot be entirely certain everything missing or modified in the record set that the Hospital promoted as the complete set. My first incident of breathing difficulty and chest pain occurred on Wednesday, April 6, 2000. In fact from April 4, 2000 to April 9, 2000, the period prior to finding the pulmonary emboli, my Hospital records on March 20, 2003, contained no nursing notes for that period, missing computerized administration of medicine, no information about being discharged by a resident despite continuance of breathing distress including administration of oxygen on August 9, 2000, test administered, *e.g.* complete computerized images of several CT scans and other information, documented by the Hospital's Dr. Lenhardt. Those records no longer appear in the medical file of Connie Reshard, not even the name of the resident.

backup of files at the Hospital.[2] Even then it would require several visits over several weeks, not one week. How can petitioner be held accountable for failure to prosecute under Rule 41 when any effort she made would have been futile? Judge Surrick's order and the Hospital's actions constructively foreclosed petitioner from taking any action before April 28, 2004 since petitioner's medical records are apparently unreliable.

A. WHETHER RULE 41(b), FED. R. CIV. P. DISMISSAL FOR FAILURE TO PROSECUTE IS REVERSIBLE, IN PART, DUE TO ERRORS *COMMITTED UNDER RULE 26(B)(1) AND (2),* ET SEQ *AND DUE TO INCONSISTENT STANDARDS.*

The district court dismissed the case under Rule 41(b), Fed. R. Civ. P. for failure to prosecute. *See App. at 42.* Rule 41(b) dismissal for failure to prosecute with prejudice is an adjudication on the merits. 41 Wright and Miller, *Federal Practice and Procedure*, Civil 3d § 2370 at 642-43 (2008). Rule 41 is intended to prevent delay and prejudice to the defendant. *Id.* Petitioner case has merit and the Hospital originated the delay issue.

Most Circuits have set forth principles that lead to inconsistent decisions under Rule 41(b) even within the Circuit because some but not all of the standards have to be used or the weight given to a particular standard may vary significantly from Circuit to Circuit and between panels within the

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[2] Petitioner has extensive background in electronic discovery for mergers and acquisitions and for complex litigation.

same Circuit. Most Circuits claim to follow strictly the principles of *Link v. Wabash R.R. Co.*, 370 U.S. 626 (1962) (held the inherent authority of a court to manage its docket including dismissal where an attorney failed to attend a hearing because of another matter)[3] but a variety of standards have emerge including a merging of the standards set forth under *Chambers v. NASCO*, 501 *U.S.* 32 (1991) (a requiring notice before imposing sanctions under its inherent authority for fraud and frivolous filings under Rule 11, Fed. R. Civ. P., case involving attorney's fees as a sanction).

The guiding principles in the Third Circuit for such cases are the *Poulis* principles[4] that are subject to many different rules some of which may be discarded as long as the lower court mentions that it applied some of the *Poulis* standards. The Third Circuit does not afford notice in its criteria when compared to other Circuits. The balancing of

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[3] This situation is similar to the Hospital's counsel in this case, when it sent a boilerplate Answer to Dr. Kimberly Lenhardt by certified mail and waited more than a month without as much as a telephone call to its own client, petitioner or the filing of a Rule 6(b) motion, despite Rule 12(a)(4)(A) 10-day filing requirement. *App.* at 26-27.

[4] (1) the extent of the party's personal responsibility; (2) the *prejudice* to the adversary caused by the failure to meet scheduling orders and respond to discovery; (3) a *history* of dilatoriness; (4) whether the conduct of the party or the attorney was *willful* or in *bad faith*; (5) the effectiveness of sanctions other than dismissal, which entails an analysis of *alternative sanctions*; and (6) the *meritoriousness* of the claim or defense. *Poulis v. State Farm Fire and Casualty Co.*, 747 F.2d 863, 868 (3d Cir. 1984).

alternative sanctions was not considered since it is not necessary according to the Third Circuit.

There is some discourse among some of the circuits regarding the principles used to determine whether a case should be dismissed for failure to prosecute. There is a lot of discretion in different Circuits that leads to disparity among the treatment of litigants depending upon the Circuit. The Ninth Circuit list five criteria[5] in determining these kind of cases and requires that it may affirm if four of the five criteria is met or if three of the five criteria is strongly met in order to dismiss a case under Rule 41, Fed. R. Civ. P. The Second Circuit believes that dismissal is a harsh remedy, only to be used in extremely rare situations not present in our case. The Second Circuit also lists several factors that may or may not be discussed by the district court judge.[6]

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[5] (1) the public's interest in expeditious resolution of litigation; (2) the court's need to manage it docket; (3) the risk of prejudice to defendants; (4) the availability of less drastic alternatives; and (5) the public policy favoring disposition of cases on their merits. *Yourish v California Amplifier*, 191 F.3d 983, 990 (9th Cir. 1999); *In re Eisen*, 31 F.3d 1447, 1451 (9th Cir. 1994).

[6] (1) whether the problems were with the plaintiff only and the period of duration; (2) the requirement of notice to the plaintiff that dismissal is the consequence; (3) whether there is prejudice to the defendants; (4) the balance between the court's calendar and the opportunity to be heard on the merits; and consideration of lesser sanctions. *See Dodson v. Runyon*, 86 F.3d 37, 39 (2d Cir 1996); *Jackson v. City of New York*, 22 F.3d 71, 75 (2d Cir. 1994) (finding that the duration factor weighed against dismissal where in no instance were the delays caused solely by the plaintiff); *Saylor v. Bastedo*, 623 F.2d 230, 239 (2d Cir. 1980); *Chira v. Lockheed Aircraft Corp.*, 634 F.2d 664, 665

When the plaintiff is not the sole alleged perpetrator as is opined here in failure to prosecute cases, dismissal would not be appropriate in the Second Circuit. Note 7, *Jackson v. City of New York,* 22 F.3d 71, 75. ***Emphasis Added.*** *See also, United States ex rel Drake v. Norden Sys.*, 375 F.3d 248, 254 (2d Cir. 2004). (Held that a 17-month delay in filing an amended complaint did not warrant dismissal for failure to prosecute). The District of Columbia Circuit uses three criteria: (1) prejudice to the other party; (2) failure of alternative sanctions to correct the situation; and (3) deterrence of future behavior. *See Shea v. Donohoe Constr. Co.*, 795 F.2d 1071, 1074 (D.C. Cir. 1986). The District of Columbia Circuit requires notice and the use of alternative sanctions before dismissal. There was no notice in this case contrary to several other circuits including the Second Circuit and the D.C. Circuit. The district court did not consider or first apply alternative and lesser sanctions, if sanctions were required at all. Several of the circuits appear to follow the *Chambers* case. A careful reading of the decision in *Chambers v. NASCO, Inc.*, 501 U.S. 32, 46-47, suggests that notice should be provided. In a dissenting opinion for *Chambers*, Justice Kennedy, with whom then-Chief Justice Rehnquist and Justice Souter joined, clearly agreed that *Chambers* modified the ability of a lower court to *sua sponte* dismiss for failure to prosecute without notice to appellant. Justice Kennedy interpreted the majority opinion in *Chambers* as requiring a motion by appellees and the

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(2d Cir. 1980) (noted that dismissal is pungent and rarely used).

requirement of due process notice.[7] Similarly, Justice Douglas, Justice Black and Chief Justice Warren argued that there had been no notice in *Link v. Wabash*. The above analysis supports appellant's contention that dismissal of this case is inconsistent with the more recent *Chambers* ruling and supports the issuance of a *writ of certiorari* in our case.

a) The Defendants Failed To Comply With The Federal Rules Of Civil Procedure.

The Third Circuit failed to consider and apply the provisions of Rule 26 as recently revised regarding electronic discovery. Rule 26(b)(1), Fed. R. Civ. P. requires complete disclosure and Rule 26 (b)(2) specifically limits the conditions for which the district court may limit discovery. *App.* at 39-40. None of the provisions for limitations would have prevented petitioner from securing electronic discovery. Current revisions to Rules 16, 26, *et seq.* specifically provide for electronic discovery. *Id.* Rule 26(b)(2)(B) specifically requires the respondent Hospital or other respondent to show good cause why such electronic discovery should be limited. No such showing by the Hospital was made or considered by the district court or the Third Circuit.

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[7] "The Court also misreads *Link v. Wabash R. Co.*, 370 U.S. 626 (1962). *Link* held that a Federal District Court possessed inherent power to dismiss a case *sua sponte* for failure to prosecute. The majority suggests that this holding contravened a prior version of Fed. Rule Civ. Proc. 41 (b), which the Court today states "appeared to require a motion from a party," *ante*, at 14-15 (emphasis added).

Judge Surrick, by requiring the certificate of merit acted inconsistently with Rule 26 (b)(1) and (2). *Id.* The November 24, 2003 hearing was not the first time petitioner requested preliminary information from the Hospital and other respondents regarding electronic discovery. She did so in her initial series of interrogatories to respondents in January/February 2003. Respondent Hospital in particular avoided cooperation. Subsequent amendments to Rule 26, Fed. R. Civ. P. makes it clear that electronic discovery requires planning and lead-time in order to be successful and ultimately expeditious. In this case only the plaintiff is designated to have committed infractions. *See* Note 1.

The Third Circuit further noted that petitioner's interlocutory appeals were examples of infractions and bad behavior—petitioner sought review of Judge Kelly's failure to allow a *pro se* plaintiff to use co-counsel for her deposition and review of Judge Surrick's infringement on Third Circuit jurisdiction of the co-counsel issue during the pendency of the appeals process that such action by the petitioner does not mitigate the situation.[8] If the interlocutory appeal succeeds, the non-compliance to a district court order is forgiven, but if the interlocutory appeal does not succeed as is the case here, the litigant must be sanctioned. In petitioner's view, dismissal is too harsh. *App.* at 14. Moreover, communication to the district court would have been futile since Judge Surrick said no changes would be

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[8] Third Circuit Case No. 04-1273. *See also*, Opinion, *App.* at 4-6.

made in his order. Communication to the Hospital would have been futile too since their goal was to limit access to all of petitioner's medical records.

b) The District Court Judge's Ruling Based On Prejudice

District Court Judge R. Barclay Surrick showed prejudice against the plaintiff in this case when he stated that the plaintiff looked fine to him, during the November 24, 2003 hearing.[9] Some of my caregivers at the Hospital said I looked fine and should be discharged, all the while I had large blood clots in both lungs. If a judge's attitude or state of mind leads a detached observer to conclude that a fair and impartial hearing is unlikely, the judge must be disqualified." ***Emphasis Added***. *Liteky v. U.S.*, 510 U.S. 540, 114 S. Ct. 1147, 1155, 1162 (1994). It is clear that the medical records contain discrepancies that would not be eliminated under the plan Judge Surrick set in motion, a ten-day calendar

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[9] The official transcript omitted the statement by Judge Surrick. It was at this time that the district court judge required a certificate of merit. Senior District Court Judge Robert Kelly discarded the matter regarding a motion to dismiss by respondent Hospital under Rule 12 (b) of the Fed. R. Civ. P. When this lawsuit was filed in 2002, a Pennsylvania procedural rule requiring a certificate of merit had expired. A subsequent rule excluded this lawsuit by excluding all litigation filed before January 27, 2003. *See* 231 Pa. Code Rule 1042.3; 40 Pa. Stat § 1303.512 (2003). Therefore the law of the case essentially excluded the provision from this case. The district court judge's remarks are prejudicial and his actions appear to violate federal law under *Erie v. Tompkins*, 304 U.S. 64 (1938), federal procedural law prevails over state law.

window of opportunity to conduct electronic forensics at the Hospital. *App. at* 20. The outcome is that no true inspection would occur and the Hospital would be free to dictate the course of the case in its favor, leading to a bias against the plaintiff in favor of the defendant Hospital.

The public is at the mercy of this Hospital litigant and in general regarding the custodial control of medical records. Pennsylvania like several other states set forth specific guidelines designed to insure that records are recorded and recorded in the appropriate detail necessary to determine what happened. Indeed Act 13 of the 2002 Pennsylvania Legislative Session, §308, H.B. 1802 states that significant events should be recorded and reported. A serious incident is defined as "An event, occurrence or situation involving the clinical care of a patient in a medical facility that results in death or compromises patient safety and results in unanticipated injury requiring the delivery of additional health care services to the patient." Clearly that is what happened to petitioner.

B. WHETHER THE SAME STANDARDS FOR A LAY PRO SE LITIGANT SHOULD BE APPLIED TO AN ATTORNEY *PRO SE* LITIGANT.

The right to proceed *pro se* was first codified in the Judiciary Act of 1789. 28 *U.S. C. §* 1654 (2000 ed.). Federal courts recognize the right to proceed *pro se* as a fundamental right. *See, Faretta v. California*, 422 U.S. 806 (1975). In the criminal context, proceeding *pro se* maybe subjected to some judicial supervision. *Johnson v. Zerbst*, 304 U.S. 458, 464-

465 (1938). In *Mckaskle v. Wiggins*, 465 U.S. 168, 187 (1984), this Court upheld the use of standby counsel for a *pro se* criminal defendant.

Here petitioner filed this lawsuit *pro se*. Both the district court and the court of appeals applied a lawyer standard to petitioner in dismissing the case under the theory that petitioner should not have the same degree of deference afforded a lay *pro se* litigant. *App.* at *2, 8.* Each time petitioner took actions as a lawyer, she was denied certain privileges because she was proceeding, *pro se*. For example, petitioner sought to bring another counsel in via motion for an appearance *pro hac vice* during her deposition. I was not allowed to do so because I was proceeding *pro se*. I am a member of the Pennsylvania bar and a member of the federal district court bar in Philadelphia where the case is located.

Rule 32(a)(3)(E) Fed. R. Civ. P. suggest that any party may have representation at a deposition.

> "A deposition taken without leave of court pursuant to a notice under Rule 30(a)(2)(C) shall not be used against a party who demonstrates that, when served with the notice, it was unable through the exercise of diligence to obtain counsel to represent it at the taking of the deposition...."

Should an attorney *pro se* litigant have less rights than any other party? That is exactly the outcome in the case for petitioner. This is an important question that should be clarified whether a different set of standards are to be applied to a lay *pro se* litigant as distinguished from an attorney *pro*

se litigant. The environment should be the same for both groups. If a different standard is to be applied to an attorney proceeding *pro se*, then that attorney litigant should not be encumbered by any of the judicial rules applied in the *pro se* context.

C. WHETHER THE COURT ERRED BY DENYING MOTION FOR DEFAULT JUDGMENT AND THE STRIKING OF PLEADINGS.

The Third Circuit failed to reverse the denial of default judgments against each of the respondents. Under Rule 55 (b) each defendant in this case failed without justification to file a timely answer pursuant to Rule 12(a)(1)(A) of the Fed. R. Civ. P. *See Supra* Note 1. Counsel for the Hospital and for Dr. Lenhardt said that they sent several letters to her but she did not respond and they found out that she had moved after the letters were returned. If you have ten days to file an Answer after the district court denies your Rule 12(b), Fed. R. Civ. P. motion, it is not unreasonable to telephone your client who had the same telephone number after she was said to have moved within the same city. Counsel for Dr. Lenhardt did not seek a Rule 6(b) extension of the time, just filed the Answer more than a month later. *App.* at 26-27.

The Third Circuit did not follow its clearly articulated standards, i) whether plaintiff will be prejudiced if default is not granted, ii) whether defendant has a meritorious defense and iii) whether defendant's delay was the result of culpable misconduct. *See Resolution Trust Corp. v. Forest Grove, Inc.*, 33 F.3d 284, 288 (3d Cir. 1994; *Emcasco Ins. Co. v. Sambuch*, 834 F.2d 71, 73 (3d Cir. 1987) Petitioner is the injured party.

When a party fails to timely file a pleading, the Third Circuit clearly states that attorneys must exercise diligence as a means of supporting good cause for a delay or failure to make timely service of process or other legal process. *Lovelace v. Acme Markets, Inc.*, 820 F.2d 81, 83-84 (3d Cir.), *cert. denied,* 484 U.S. 965, 108 S. Ct. 455 (1987); *Braxton v. United States*, 817 F.2d 238, 242 (3d Cir. 1987).

Similarly, respondent counsel for Dr. Glassner, promptly entered an appearance and immediately initiated discovery without a court order under Rule 26 (d) and (f). Clearly, all of the respondents defaulted or otherwise deliberately failed to comply with the Federal Rules of Civil Procedure. The Hospital immediately filed for a motion for summary judgment close in time to the filing of the late Answer. Under the rules applied to the default judgment in the Third Circuit, petitioner is entitled to judgment against all parties. The standards under the default judgment are similar to the standards applied to failure to prosecute cases and have the same impact on the parties but here the respondents dodged the bullet. The difference between how Rule 55 is administered and how Rule 41 is administered leads to unequal justice under

law. This is clearly an important federal question involving the application of the federal rules.

V. CONCLUSION

Petitioner urges the Court to grant a *writ of certiorari* in this case in order to ensure uniform interpretation of the Federal Rules of Civil Procedure. The case presents several important issues involving differences among the Circuits regarding dismissal for failure to prosecute, the lack of application of electronic discovery to this case and unclear rules for lay *pro se* litigants versus attorney *pro se* litigants. Other issues presented underscore manifest injustice to this petitioner and other litigants.

APPENDIX

Third Circuit Opinion, November 29, 2007

NOT PRECEDENTIAL
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No: 06-3170
CONNIE C. RESHARD,
Appellant
v.
THE LANKENAU HOSPITAL, d/b/a, a/k/a MAIN LINE HEALTH;
DR. MICHAEL J. GLASSNER; DR. JOHN SCHILLING; DR. MARK E. SCOTT; DR. KIMBERLY M. LENHARDT; DR. THOMAS J. MEYER;
DR. GEOFFREY P. TREMBLAY; UNKNOWN RESIDENT; MAIN LINE HOSPITAL INCORPORATED, a/k/a The Lankenau Hospital

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Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. No. 02-cv-01787)
District Judge: Hon. R. Barclay Surrick

Submitted Under Third Circuit LAR 34.1(a)
November 8, 2007
Before: SCIRICA, *Chief Judge*, AMBRO and JORDAN, *Circuit Judges*.
(Filed: November 29, 2007)

OPINION OF THE COURT

JORDAN, *Circuit Judge.*

In this medical malpractice case, Connie C. Reshard appeals the final judgment of the United States District Court for the Eastern District of Pennsylvania, dismissing her complaint for failure to prosecute. For the reasons stated below, we affirm.

I.

Reshard, a member of the Pennsylvania Bar, brought this medical malpractice suit *pro se* against Lankenau Hospital and six doctors in 2002. Although no significant discovery had taken place, over 140 documents and motions had been filed in the case by the time it was reassigned to the Honorable R. Barclay Surrick from another District Judge. Judge Surrick denied all outstanding motions and ordered the discovery process to be started anew. On November 26, 2003, the District Court ordered Lankenau Hospital to allow Reshard to inspect all of its records pertaining to her treatment and ordered her to produce before February 9, 2003 a statement from a qualified licensed professional indicating that there was a reasonable probability that the defendants' conduct in treating her fell outside acceptable professional standards. December 1, 2003, Reshard filed four new motions, which requested personal information from the District Judge and sought to vacate the Court's previous scheduling and discovery orders. The District Court denied all four motions in an order dated December 31, 2003. In early 2004, Reshard attempted to appeal that order

and certain other orders of the District Court, but this Court dismissed her appeal on November 16, 2004 for lack of jurisdiction.[1] Although Reshard had an appointment to inspect the Lankenau Hospital records, she did not keep that appointment and did not reschedule. Nor did she produce the required statement from a qualified licensed professional. On February 20, 2004, the District Court held a scheduling conference. Reshard did not appear and did not contact the Court to explain her absence. Over two years later, on April 28, 2006, the District Court dismissed the case *sua sponte* for failure to prosecute. At the time the District Court dismissed the case, Reshard had not contacted either the Court or the defendants since the missed February 20, 2004 scheduling conference. The District Court had jurisdiction under 28 U.S.C. § 1332. We have jurisdiction under 28 U.S.C. § 1291.

II.

We review a district court's dismissal for failure to prosecute for abuse of discretion. *Spain v. Gallegos*, 26 F.3d 439, 454 n.17 (3d Cir. 1994). On appeal, Reshard argues that the dismissal was improper for three reasons. First, she argues that the dismissal was improper because the District Court acted *sua sponte* and did not notify her that it planned to dismiss. However, district courts have inherent power to dismiss *sua sponte* for failure to prosecute. *Link v. Wabash R.R. Co.*, 370 U.S. 626, 630-31 (1962). Moreover, "a District Court may dismiss a complaint for failure to prosecute even without affording notice of its intention to do so or providing

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[1] This Court also dismissed on November 16, 2004 an appeal filed by Reshard in March 2003.

an adversary hearing before acting." *Id.* at 633. Next, Reshard argues that the dismissal for failure to prosecute was improper because the District Court misapplied the applicable legal standard. We disagree. When considering whether to dismiss a case for failure to prosecute, courts generally should consider the factors set forth in *Poulis v. State Farm Fire and Casualty Co.*, 747 F.2d 863, 868 (3d Cir. 1984): (1) the extent of the *party's* personal *responsibility*; (2) the *prejudice* to the adversary caused by the failure to meet scheduling orders and respond to discovery; (3) a *history* of dilatoriness; (4) whether the conduct of the party or the attorney was *willful* or in *bad faith*; (5) the effectiveness of sanctions other than dismissal, which entails an analysis of *alternative sanctions*; and (6) the *meritoriousness* of the claim or defense. In this case, the District Court considered the *Poulis* factors and concluded that all of them, except for the meritoriousness of the claim, favored dismissal. With respect to the meritoriousness of Reshard's claim, the District Court found that Reshard's own conduct in delaying the discovery process made that factor impossible to assess. In light of these findings, and under the circumstances of this case, we cannot say that the District Court abused its discretion in dismissing the case. Because we hold that the District Court's dismissal was proper, we decline to address Reshard's arguments regarding certain allegedly erroneous orders entered by the District Court prior to dismissing the case. Indeed, to the extent that Reshard argues that her actions (or lack thereof) in this case would be excused by an erroneous order, she is incorrect. *See Marshall v.*

Sielaff, 492 F.2d 917, 919 (3d Cir. 1974) ("If a litigant could refuse to proceed whenever a trial judge ruled against him, wait for the court to enter a dismissal for failure to prosecute, and then obtain review of the judge's interlocutory decision, the policy against piecemeal litigation and review would be severely weakened."); *Spain v. Gallegos*, 26 F.3d 439, 454 (3d Cir. 1994) ("A party disappointed with a court's ruling may not refuse to proceed and then expect to obtain relief on appeal from an order of dismissal or default."). We also reject Reshard's assertion that Judge Surrick appears to be biased against her. The only basis Reshard offers in support of her allegation of bias is Judge Surrick's . Third, and finally, Reshard argues that the District Court was without jurisdiction to enter the order of dismissal (or any other order) because Reshard had appeals pending before this Court. Once again, we disagree. Reshard's appeals were dismissed by this Court for lack of jurisdiction because the orders she was attempting to appeal from were not final within the meaning of 28 U.S.C. § 1291 and were not immediately appealable as collateral orders. As such, they did not deprive the District Court of jurisdiction: [T]he jurisdiction of the lower court to proceed in a cause is not lost by the taking of an appeal from an order or judgment which is not appealable. ... Indeed, a contrary conclusion would enable a litigant temporarily to deprive a district court of jurisdiction at any non-critical or critical juncture including trial itself, thus bringing proceedings in the district court to a standstill while a non-appealable ruling wends its way through the appellate process. *Venen v. Sweet*, 758 F.2d 117, 121 (3d Cir. 1985) (internal quotation

and citation omitted). Accordingly, Reshard's improper appeals did not preclude the District Court from proceeding with this case and, ultimately, dismissing it for failure to prosecute.2 legal rulings, which are insufficient to establish that Judge Surrick was biased. *See Liteky v. United States*, 510 U.S. 540, 555-56 (1994).

III.

We have considered the remainder of Reshard's arguments and find them unpersuasive. For the foregoing reasons, we affirm the judgment of the District Court.

Rehearing Order, February 13, 2008

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No: 06-3170

CONNIE C. RESHARD,
Appellant
v.
THE LANKENAU HOSPITAL, d/b/a, a/k/a MAIN LINE HEALTH;
DR. MICHAEL J. GLASSNER; DR. JOHN SCHILLING; DR. MARK E. SCOTT; DR. KIMBERLY M. LENHARDT; DR. THOMAS J. MEYER;
DR. GEOFFREY P. TREMBLAY; UNKNOWN RESIDENT; MAIN LINE HOSPITAL INCORPORATED, a/k/a The Lankenau Hospital

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Appeal from the United States District Court

for the Eastern District of Pennsylvania
(D.C. No. 02-cv-01787)
District Judge: Hon. R. Barclay Surrick

SUR PETITION FOR REHEARING

Present: SCIRICA, Chief Judge, SLOVITER, McKEE, RENDELL, BARRY, AMBRO, FUENTES, SMITH, FISHER, CHAGARES, JORDAN, and HARDIMAN, Circuit Judges

The petition for rehearing filed by appellants in the above entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular service not having voted for rehearing, the petition for rehearing by the panel and the Court en banc, is denied.

BY THE COURT:
/s/ Kent A. Jordan
Circuit Judge
Dated: February 13, 2008

Order And Memorandum of Dismissal For Failure To Prosecute April 28, 2004

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF
PENNSYLVANIA

CONNIE C. RESHARD ::
CIVIL ACTION
:
v. ::
NO. 02-1787
:
THE LANKENAU HOSPITAL, D/B/A, :
A/K/A MAIN LINE HEALTH, DR. MICHAEL :
J. GLASSNER, DR. JOHN SCHILLING, DR. :
MARK E. SCOTT, DR. KIMBERLY M. :
LENHARDT, DR. THOMAS J. MEYER AND :
DR. GEOFFREY P. TREMBLAY :

SURRICK, J. APRIL 28, 2006

MEMORANDUM & ORDER

Plaintiff, Connie C. Reshard, Esquire, a member of the Pennsylvania bar, brought this action pro se against six doctors and Lankenau Hospital, alleging medical malpractice in connection with a procedure that she underwent at Lankenau Hospital on April 4, 2000. For the following reasons, we will dismiss this case with prejudice for failure to prosecute.

I. BACKGROUND

Plaintiff is a practicing attorney and member of the Bar of the Commonwealth of Pennsylvania. Plaintiff's Complaint was filed on April 2, 2002. The case was assigned to the Honorable Robert F. Kelly. After disposing of several preliminary motions, Judge Kelly set discovery deadlines. Those deadlines had to be extended because of discovery disputes. In fact, the discovery process was punctuated by

numerous disputes, several of which went to the Third Circuit. (COA Docket Nos. 03-1623; 03-1899.)

In addition to an unusual number of sanctions requests by all parties, Plaintiff sought recusal of Judge Kelly from the case. Plaintiff asserted that Judge Kelly's bias against her merited disqualification. While Judge Kelly found that the several motions for recusal were insufficient, he voluntarily recused himself, recognizing that "Plaintiff's various motions and issues regarding her disagreement with my decisions has aided in rendering this action over one year old with the filing of over 120 documents and motions." (Doc. No. 128 at 7-8.) The case was reassigned to this Court on April 22, 2003. (Doc. No. 130.) Our first action was to deny all outstanding motions and start the discovery process anew. This decision was made in an attempt to avoid the prior discovery disputes and move the case forward efficiently. At that point, the case was eighteen months old and over 140 documents and motions had been filed, but no significant discovery had been undertaken. On November 26, 2003, we held a Pretrial Conference in open court. Thereafter, as discussed at the conference, an Order was entered directing Defendants to allow Plaintiff to inspect the original Lankenau Hospital records at Lankenau Hospital and to provide Plaintiff with a date stamped copy of the records within two weeks. The Order also required Plaintiff to produce a statement within sixty (60) days from a qualified licensed professional or professionals indicating that the professionals believed that there was a reasonable probability that the care, skill, and knowledge exhibited by each defendant in the treatment of Plaintiff fell outside

acceptable professional standards and that such conduct was a cause in bringing about harm to Plaintiff. (Doc. No. 141.) We advised counsel that after the Court received this statement of merit, the depositions of Plaintiff and Defendants would be immediately scheduled and the case would be moved expeditiously to trial.

On December 1, 2003, Plaintiff filed four additional motions. (Doc. Nos. 142 ,144, 145, 148.) These motions requested nonrelevant information from the Court and sought to vacate the Court's previous orders. The motions again illustrated Plaintiff's intention to further prevent the movement of this case forward. In our Order dated December 31, 2003, we denied each of these motions. (Doc. No. 156.) Plaintiff appealed this Order, as well as our Orders of October 15, and November 26, 2003. (COA Docket No. 04-1273.) This was Plaintiffs third appeal in this case. On November 16, 2004, the Third Circuit dismissed the appeals for lack of jurisdiction. (Doc. No. 160.) Plaintiff still took no action with regard to our discovery Order. Pursuant to the Order of November 26, 2003, Defendant Lankenau Hospital scheduled an appointment with Plaintiff to allow her an opportunity to inspect all of the Hospital's records concerning her medical treatment. Defendant Bates stamped these documents and certified that they were complete. Plaintiff failed to appear to inspect the documents and did not call or e-mail to reschedule the appointment.

On February 20, 2004, we held a conference in court for the purpose of scheduling depositions and setting a trial date. The conference was scheduled to begin at 9:30 a.m. Plaintiff did not appear. At 10:00

a.m., we began the conference despite Plaintiff's absence. Plaintiff did not contact Chambers or Defense counsel to explain her absence or her failure to comply with our Order to produce a certification from a medical professional concerning the merits of her case. At the conclusion of the hearing, Defense counsel made an oral motion for sanctions pursuant to Fed. R. Civ. P. 37(b)(2)(C). Counsel asked that we dismiss the case with prejudice and award appropriate attorney's fees. In the alternative, Counsel asked that we renew Defendants' Motion for Summary Judgment. (Doc. No. 159 at 10.) Since that conference, Plaintiff has not communicated with the Court, has not communicated with Defense counsel, and has done nothing to pursue this case.

II. DISMISSAL FOR FAILURE TO PROSECUTE

A. Legal Standard

Federal courts have an inherent power to dismiss with prejudice a plaintiff's action for lack of prosecution as a necessary sanction to prevent undue delays and to avoid congestion. *Link v. Wabash R.R. Co.*, 370 U.S. 626, 629-31 (1962). This authority has been expressly recognized by Federal Rule of Civil Procedure 41(b): "For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against the defendant."[1] Fed. R. Civ. P. 41(b). In addition, it is well recognized that

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[1] We note also that Local R. Civ. P. 41.1(a) allows the Court to eliminate abandoned actions from the court's calendar. The rule considers a case abandoned when it has been dormant for more than one year. *Id.*; *see also Young Jewish Leadership v. 939 HKH Corp.*, No. Civ. A. 93-2634, 2005 WL 2050440 (E.D. Pa. Aug. 23. 2005).

"[t]he authority of a court to dismiss sua sponte for lack of prosecution has generally been considered an 'inherent power,' governed not by rule or statute but by the control necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases." *Link*, 370 U.S. at 630-31. It is also clear that where a plaintiff fails to take action on a case for an extended period of time, the Court is entitled to dismiss for failure to prosecute. In *Shannon v. General Electric Co.*, 186 F.3d 186 (2d Cir. 1999), the Second Circuit stated: The only action [plaintiff] took during [a] nearly two-year period was to file an untimely notice of appeal of the court's 1996 order, which appeal was subsequently withdrawn for lack of jurisdiction. Those cases in which we have reversed dismissals for failure to prosecute have involved substantially shorter delays than the one at issue here. Where, as here, "inaction and lethargy became the rule," we have not hesitated to affirm a district court's dismissal for failure to prosecute. *Id.* at 194 (internal citations omitted). Similarly, the Third Circuit has made clear that district courts may exercise this power to dismiss and may, in fact, find that it is the only appropriate recourse when "confronted with litigants who flagrantly violate or ignore court orders." *Mindek v. Rigatti*, 964 F.2d 1369, 1373 (3d Cir. 1992); *see also Curtis T. Bedwell & Sons, Inc. v. Int'l Fid. Ins. Co.*, 843 F.2d 683, 696 (3d Cir. 1988) (affirming dismissal as a Rule 37 sanction for failing to comply with discovery orders over an extended period of time); *Marshall v. Sielaff*, 492 F.2d 917, 919 (3d Cir. 1974) (upholding dismissal for failure to prosecute as appropriate under Rule 41(b) and

pursuant to the inherent power of the court). Although "dismissal is a harsh remedy and should be resorted to only in extreme cases," *Mindek*, 964 F.2d at 1373 (quoting *Marshall*, 492 F.2d at 918), "[t]he district courts cannot, and should not, tolerate unjustifiable delays and expenditure of irreplaceable judicial resources caused by litigants, *pro-se* or represented, who will not obey court orders." *Id.* at 1375. The Third Circuit has counseled that when considering whether it is appropriate to dismiss a case, courts should consider the six factors set forth in *Poulis v. State Farm Fire and Casualty Co.*, 747 F.2d 863 (3d Cir. 1984). Those factors are: (1) the extent of the party's personal *responsibility*; (2) the *prejudice* to the adversary caused by the failure to meet scheduling orders and respond to discovery; (3) a *history* of dilatoriness; (4) whether the conduct of the party or the attorney was *willful* or in *bad faith*; (5) the effectiveness of sanctions other than dismissal . . . and (6) *the meritoriousness* of the claim or defense. *Id.* at 868. "The *Poulis* standard is not a mechanical calculation for deciding whether or not to dismiss a plaintiff's complaint, and not all of the Poulis factors need be satisfied in order to dismiss a complaint. Rather, the decision whether or not to dismiss a claim under *Poulis* is a balancing test, that must be made in the context of the district court's extended contact with the litigant." *Smith ex rel. Ali v. Altegra Credit Co.*, No. 02-CV-8221, 2004 U.S. Dist. LEXIS 21478, at *12 (E.D. Pa., Sept. 22, 2004) (internal citations and quotations omitted). In addition, "when a litigant's conduct makes adjudication of the case impossible, such balancing under *Poulis* is unnecessary." *Sebrell v. Phila. Police*

Dep't, 159 Fed. Appx. 371, 374 (3d Cir. 2005) (citing *Guyer v. Beard*, 907 F.2d 1424, 1429-30 (3d Cir. 1990).

B. Legal Analysis

In the instant case, Plaintiff has not taken any action in this matter in nearly two and a half years. To date, the only action Plaintiff has taken since December 19, 2003 was to file an unsuccessful interlocutory appeal in January 2004 and an unsuccessful appellate petition for rehearing in December 2004.[2] (Doc. No. 157.) Plaintiff has violated discovery orders, failed to appear at scheduled conferences with the Court, and failed to communicate with the Court or opposing counsel.

First, Plaintiff violated our November 26, 2003 discovery Order. In that Order we required Plaintiff to: provide this Court with a written signed statement from an appropriate licensed professional that, after review of the Lankenau Hospital records, the licensed professional believes that there exists a reasonable probability that the care, skill and knowledge exercised or exhibited in the treatment, practice or work that is the subject of the Plaintiff's Complaint fell outside acceptable professional standards and that such conduct was a cause in bringing about harm to Plaintiff. (Doc. No. 141.) With that instruction we warned that failure to comply with this Order would result in "the imposition of severe sanctions." (*Id.*) Plaintiff never produced any documents pertaining to her treatment

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[2] This appeal was dismiss for lack of jurisdiction by the Third Circuit on November 16, 2004. (Doc. No. 160.) The petition for rehearing was denied by the Third Circuit on December 17, 2004. (COA Docket No. 03-1899.)

nor did she provide a legitimate excuse for noncompliance. In addition, Plaintiff failed to appear for an appointment with Defendant to inspect relevant hospital records concerning her treatment and did not call Defense counsel to indicate that she could not make the appointment. (Doc. No. 159 at 3.) Finally, Plaintiff failed to appear at a scheduled hearing on February 20, 2004 and failed to communicate with the Court on that day or in the time since to provide a reason for not appearing. The purpose of that hearing was to schedule depositions in an effort to move the case forward after months of delays in discovery. Plaintiff's failure to appear and to communicate with the Court or Defense counsel has made it impossible to move the case forward. In considering the *Poulis* factors, it is clear that dismissal is the only appropriate action in this matter. Plaintiff's failure to appear, failure to communicate with the Court or Defense counsel, and flagrant failure to comply with Court orders justifies the sanction of dismissal in this case. The docket reveals that Plaintiff has delayed and frivolously contested every step in the pre-trial process. Through the repeated use of frivolous appeals and periods of absolute inaction, this case has been ongoing for four years and only one deposition has been taken. In addition, the nearly two and a half years of total inaction and non-communication by the Plaintiff can no longer be countenanced. Moreover, Defendants have been prejudiced by Plaintiff's delay. Numerous depositions have been rescheduled due to Plaintiff's failure to comply with previous scheduling orders. These tactics have cost Defendants significant resources. Defendants have also been required to

spend money on legal fees combating Plaintiff's motions concerning discovery and sanctions. As a result of the delay, Defendants have not yet even had an opportunity to physically examine Plaintiff and assess the extent of her alleged injuries and her claim as a whole. Furthermore, alternative sanctions would not be feasible or effective in this case. Plaintiff has ignored court orders, failed to appear at depositions and court conferences, and has taken no action at all for almost two and a half years. Clearly, any alternative sanctions would be futile. As a result of Plaintiff's conduct, it is difficult to assess the merits of her claims. However, all of the other *Poulis* factors militate in favor of dismissal in this case. Plaintiff's utter failure to communicate with the Court and to pursue this matter has made adjudication of the case impossible even without consideration of these factors. *See Sebrell*, 159 Fed. Appx. at 374. Accordingly, we are compelled to dismiss this case with prejudice.

An appropriate Order follows.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF
PENNSYLVANIA
CONNIE C. RESHARD ::
CIVIL ACTION
:
v. ::
NO. 02-1787
:
THE LANKENAU HOSPITAL, D/B/A, :
A/K/A MAIN LINE HEALTH, DR. MICHAEL :
J. GLASSNER, DR. JOHN SCHILLING, DR. :

MARK E. SCOTT, DR. KIMBERLY M. :
LENHARDT, DR. THOMAS J. MEYER AND :
DR. GEOFFREY P. TREMBLAY :

ORDER

AND NOW, this 28th day of April, 2006, it is ORDERED that Plaintiff's complaint is DISMISSED with prejudice for failure to prosecute.
IT IS SO ORDERED.

BY THE COURT:
S/ R. Barclay Surrick

U.S. District Judge

District Court Rehearing Denied May 26, 2006

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF
PENNSYLVANIA
CONNIE C. RESHARD ::
CIVIL ACTION
v. ::
NO. 02-1787
THE LANKENAU HOSPITAL, D/B/A, :
A/K/A MAIN LINE HEALTH, DR. MICHAEL :
J. GLASSNER, DR. JOHN SCHILLING, DR. :
MARK E. SCOTT, DR. KIMBERLY M. :
LENHARDT, DR. THOMAS J. MEYER AND :
DR. GEOFFREY P. TREMBLAY :

ORDER

"The purpose of a motion for re 1 consideration is to correct manifest errors of law or fact or to present newly discovered evidence." *Harsco Corp. v. Zlotnicki*, 779 F.2d 906, 909 (3d Cir. 1985). Courts

should grant these motions sparingly, reserving them for instances when (1) there has been an intervening change in controlling law, (2) new evidence has become available, or (3) there is a need to correct a clear error of law or fact or to prevent manifest injustice. *Gen. Instrument Corp. of Del. v. Nu-Tek Elecs. & Mfg., Inc.*, 3 F. Supp. 2d 602, 606 (E.D. Pa. 1998). "A motion for reconsideration is not to be used as a means to reargue matters already argued and disposed of or as an attempt to relitigate a point of disagreement between the Court and the litigant." *Corneal v. Jackson Twp.*, 313 F. Supp. 2d 457, 472 (M.D. Pa. 2003) (internal citations omitted). Plaintiff has offered no new evidence, has failed to point to an intervening change in law, and has failed to demonstrate an error of law or fact or a need to prevent manifest injustice.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF
PENNSYLVANIA
CONNIE C. RESHARD ::
CIVIL ACTION
v. ::
NO. 02-1787
THE LANKENAU HOSPITAL, D/B/A, :
A/K/A MAIN LINE HEALTH, DR. MICHAEL :
J. GLASSNER, DR. JOHN SCHILLING, DR. :
MARK E. SCOTT, DR. KIMBERLY M. :
LENHARDT, DR. THOMAS J. MEYER AND :
DR. GEOFFREY P. TREMBLAY :

ORDER

AND NOW, this 25th day of May, 2006, upon consideration of Plaintiff's Motion To Vacate Order Of Dismissal Or In The Alternative, Motion For Reconsideration (Doc. No. 162) and Defendants' responses thereto (Doc. Nos. 163, 164, 165, 166), it is ORDERED that Plaintiff's Motion is DENIED.1
IT IS SO ORDERED.

BY THE COURT:
/s R. Barclay Surrick

R. Barclay Surrick, Judge

Order, November 26, 2003

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF
PENNSYLVANIA
CONNIE C. RESHARD, :
Plaintiff : CIVIL ACTION
:
v.
NO. 02-1787
:
THE LANKENAU HOSPITAL, D/B/A, :
A/K/A MAIN LINE HEALTH, DR. MICHAEL :
J. GLASSNER, DR. JOHN SCHILLING, DR. :
MARK E. SCOTT, DR. KIMBERLY M. :
LENHARDT, DR. THOMAS J. MEYER AND :
DR. GEOFFREY P. TREMBLAY, :
Defendants.

ORDER

AND NOW, this 26th day of November, 2003, it is ORDERED as follows: 1. On or before December 9, 2003, Defendant Lankenau Hospital shall permit Plaintiff to view at Lankenau Hospital all original

records regarding the care and treatment of Plaintiff at Lankenau Hospital. 2. On or before December 9, 2003, Lankenau Hospital shall provide Plaintiff with bates stamped copies of all of its original records pertaining to the care and treatment of Plaintiff at Lankenau Hospital. 3. Lankenau Hospital shall also certify to the Court that Plaintiff has received copies of all records pertaining to her care and treatment at Lankenau Hospital. 4. On or before February 9, 2003, Plaintiff shall provide this Court with a written It is not required that the "appropriate licensed professional" who supplies such a statement be the same person who will actually testify at trial. It is required, however, that the "appropriate licensed professional" who supplies such a statement be an expert with sufficient education, training, knowledge and experience to provide credible, competent testimony and such qualifications that the trial court would find the licensed professional qualified to testify as an expert at trial. signed statement from an appropriate licensed professional1 that, after review of the Lankenau Hospital records, the licensed professional believes that there exists a reasonable probability that the care, skill and knowledge exercised or exhibited in the treatment, practice or work that is the subject of the Plaintiff's Complaint fell outside acceptable professional standards and that such conduct was a cause in bringing about harm to Plaintiff. The written signed statement shall address each Defendant separately. 5. The above deadlines will not be extended for any reason. 6. Failure to comply with this Order will result in the imposition of severe sanctions. 7. A

scheduling/status conference is scheduled for February 20, 2004 at 9:30 a.m. in Courtroom 8-A.

IT IS SO ORDERED.
BY THE COURT:

_____
R. Barclay Surrick, Judge

Order, September 13, 2002

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF
PENNSYLVANIA

CONNIE C. RESHARD, :
Plaintiff : CIVIL ACTION
:
v. ::
NO. 02-1787
:
THE LANKENAU HOSPITAL, D/B/A, :
A/K/A MAIN LINE HEALTH, DR. MICHAEL :
J. GLASSNER, DR. JOHN SCHILLING, DR. :
MARK E. SCOTT, DR. KIMBERLY M. :
LENHARDT, DR. THOMAS J. MEYER AND :
DR. GEOFFREY P. TREMBLAY, :
Defendants.

ORDER

AND NOW, this 13th day of September, 2002, upon consideration of Plaintiff's Motion for Default Judgment Against Defendants Glassner, Schilling, Scott, Tremblay and Meyer, and the Responses and Replies thereto, it is hereby ORDERED that:

1. the Motion (Dkt. No. 15) is DENIED.

2. Defendants, Dr. John F. Schilling and Mark E. Scott, D.O.'s Cross-Motion to Strike the Complaint or, in the Alternative, to Allow Defendants, Schilling and Scott Additional Time to Answer the Amended Complaint (Dkt. Nos. 0-1 and 0-2) is DENIED in part and GRANTED in pat. Defendants' Motion to Strike the Complaint (0-1) is DENIED. Defendants' Request for Additional Time to Answer the Amended Complaint (0-2) is GRANTED. Defendants Schilling and Scott shall respond to Plaintiff's Amended Complaint within 1wenty (20) days from the date of this Order.

3. Defendant Dr. Geoffrey P. Tremblay's Cross-Motion to Strike the Complaint, or in the Alternative, to Allow Defendant, Dr. Geoffrey P. Tremblay, Additional Time to Answer the Amended Complaint (Dkt. Nos. 0-1 and 0-2) is DENIED IN PART AND granted IN PART. DEFENDANT'S motion to Strike the Complaint (0-1) is DENIED. Defendant's Request for Additonal Time to Answer this Amended Complaint (0-2) is GRANTED.[1] Defendant Tremblay shall respond to Plaintiff's Amended Complaint within twenty (20) days from the date of this Order.

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[1] Defendant Tremblay filed an Answer to Plaintiff's Amended Complaint on August 26, 2002. Although Defendant Tremblay has filed an Answer, the Court will allow him to rile a response to Plaintiff's Amended Complaint. *See Prendergast v. Janecka*, No. 00-3099, 2001 WL 793251, at *1 (E.D. Pa. July 10, 2001); *Trustees of the University of Pennsylvania v. Mayflower Transit, Inc.*, No. 97-1111, 1997 WL 598001, at *1-2 (E.D. Pa. Sept. 16, 1997).

4. Defendant, Thomas J. Meyer's Cross-Motion to Strike the Complaint, or in the Alternative, to Allow Defendant, Thomas J. Meyer, Additional Time to Answer the Amended Complaint (Dkt. Nos. 0-1 and 0-2) is Denied in part and GRANTED in part. Defendant's Motion to Strike the Complaint (0-1) is DENIED. Defendant's Request for Additional Time to Answer the Amended Complaint (0-2) is GRANTED. Defendant Meyer shall respond to Plaintiff's Amended Complaint within twenty (20) days from the date of this Order.

BY THE COURT:

/S/

Robert F. Kelly

Order March 27, 2003

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF
PENNSYLVANIA

CONNIE C. RESHARD, :
Plaintiff : CIVIL ACTION
:
v. ::
NO. 02-1787
:
THE LANKENAU HOSPITAL, D/B/A, :
A/K/A MAIN LINE HEALTH, DR. MICHAEL :
J. GLASSNER, DR. JOHN SCHILLING, DR. :
MARK E. SCOTT, DR. KIMBERLY M. :
LENHARDT, DR. THOMAS J. MEYER AND :
DR. GEOFFREY P. TREMBLAY, :
Defendants.

ORDER

AND NOW, this 27th day of March, 2003, upon consideration of Plaintiff's Emergency Motion Requesting Clarification and Authorization for Use of Counsel at Plaintiff's Deposition (Doc. No. 107), it is hereby ORDERED that the Motion is DENIED.

It is further ORDERED that no counsel, who has not been admitted to practice before this Court pursuant to Rule 83.5 of the Local Rules of Civil Procedure for the United States District Court for the Eastern District of Pennsylvania, shall take part in any way in the deposition of Plaintiff, Connie C. Reshard, or any other deposition in this action. *See Local R. Civ. P.* 83.5; 83.5.2*; Hearst/ABC-Viacom Entertainment Services v. Goodway marketing, Inc.*, 145 F.R.D. 59, 63-64 (E.D. Pa. 1992).

Order, January 24, 2003

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF
PENNSYLVANIA

CONNIE C. RESHARD, :
Plaintiff : CIVIL ACTION
:
v. ::
NO. 02-1787
:
THE LANKENAU HOSPITAL, D/B/A, :
A/K/A MAIN LINE HEALTH, DR. MICHAEL :
J. GLASSNER, DR. JOHN SCHILLING, DR. :
MARK E. SCOTT, DR. KIMBERLY M. :
LENHARDT, DR. THOMAS J. MEYER AND :
DR. GEOFFREY P. TREMBLAY, :
Defendants.

ORDER

AND NOW, this 24th day of January, 2003, upon consideration of Plaintiff's Motion to Strike Defendants' Main Line Hospitals, Inc. and Dr. Kimberly Lenhardt's Answer and Motion to Compel Discovery and Motion for Summary Judgment for Defendant Lenhardt and Demand for Appropriate Relief (Doc. No. 53), the Reponses and Reply thereto, and in light of the hearing held in this Court on January 24, 2003, it is hereby ORDERED that the Motion is DENIED.

HEARING TRANSCRIPT, EXCERPTS, JANUARY 24, 2003

THE COURT: The reason I wanted this meeting, I didn't think there was any other way to try to straighten this out. We have a number of outstanding motions and we could start just about anywhere. Reshard's motion to strike defendant's, Main Line Hospital's and Dr. Kimberly Lenhardt's answer, Yes?

ATTORNEY FOR LANKENAU AND DR. LENHARDT: That's myself, your Honor. Your Honor, just that we filed our reply motion for that. You know, we were late in filing our answer. However, you know, with the Court's deference, we apologize and ask if we could move forward on the merits. It's been kind of a procedural mess since we got started.

THE COURT: Yes? Do you wish to address that?

MS. RESHARD: Yes, your Honor. There's no procedural mix-up here. The rules are very clear. Ten days after a denial of a Rule 12(b) motion. Plaintiffs were waiting and waiting and we received

no request under Rule 6(b) to this Court for an extension, either before the time expired or after the time expired. Plaintiff expected that the Court was going to have a conference and that there would be a discovery plan submitted by all the parties. You know the fact that –

THE COURT: That doesn't have to do anything with the answer. We're talking about whether or not this answer is going to be allowed.

MS. RESHARD: well, your Honor, the reasons that were given could have been given in a Rule 6(b) motion. There is not excuse. They are licensed attorneys. We are expected to follow the rules. I have been chastised by this Court to follow the rules. It's very clear in every jurisdiction, in every court, if you cannot meet a deadline, for whatever reason, you apply to the Court for permission and the 3rd Circuit, in many cases, I don't have any that I represent at this time, have in the cases on even smaller situations, where a party did not follow the rules and did not have justifiable cause for not doing so. In fact, this particular defendant decided to file it any time that they wanted, which was approximately six weeks from the date of the time.

And the answer filed was basically boilerplate language. Language that could have been filed very, very briefly and shortly after the ten day requirement.

THE COURT: Okay. Can I specifically have your reason for filing the late answer?

ATTORNEY FOR LANKENAU AND DR. LENHARDT: Sure, your Honor. Essentially, that Dr. Lenhardt has moved to Fairfax, Virginia and then when she got to Fairfax, Virginia, she moved

again. We initially mailed her the answer, it came back to us. And then we mailed it again. And then she contacted us, we have a new address. We mailed it again. She reviewed it and then mailed it back to us with her signed verification. That was the only delay in not filing it sooner. You know, I'm not going to get into a finger-pointing match with Ms. Reshard. It's just, you know, she was initially –

Constitution, Federal Rules of Civil Procedure

U.S. CONSTITUTION, FEDERAL STATUTES AND RULES

UNITED STATES CONSTITUTION

Amendment XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law, which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor

shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

FEDERAL STATUTES, Title 28 (2000 ed.)

Sec. 144. Bias or prejudice of judge

Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding.

The affidavit shall state the facts and the reasons for the belief that bias or prejudice exists, and shall be filed not less than ten days before the beginning of the term at which the proceeding is to be heard, or good cause shall be shown for failure to file it within such time. A party may file only one such affidavit in any case. It shall be accompanied by a certificate of counsel of record stating that it is made in good faith.

Sec. 455. Disqualification of justice, judge, or magistrate judge

(a) Any justice, judge, or magistrate judge of the United States
shall disqualify himself in any proceeding in which his impartiality
might reasonably be questioned.

(b) He shall also disqualify himself in the following circumstances:

(1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;

Sec. 1332. Diversity of citizenship; amount in controversy; costs

(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $75,000, exclusive of interest and costs, and is between--

(1) citizens of different States;

(2) citizens of a State and citizens or subjects of a foreign state;

(3) citizens of different States and in which citizens or subjects of a foreign state are additional parties; and

(4) a foreign state, defined in section 1603(a) of this title, as plaintiff and citizens of a State or of different States.

Sec. 1654. Appearance personally or by counsel

In all courts of the United States the parties may plead and conduct their own cases personally or by

counsel as, by the rules of such courts, respectively, are permitted to manage and conduct causes therein.

FEDERAL RULES OF CIVIL PROCEDURE (2000 ed.)

Rule 6. Time

(a) Computation. In computing any period of time prescribed or allowed by these rules, by the local rules of any district court, by order of court, or by any applicable statute, the day of the act, event, or default from which the designated period of time begins to run shall not be included. The last day of the period so computed shall be included, unless it is a Saturday, a Sunday, or a legal holiday, or, when the act to be done is the filing of a paper in court, a day on which weather or other conditions have made the office of the clerk of the district court inaccessible, in which event the period runs until the end of the next day which is not one of the aforementioned days. When the period of time prescribed or allowed is less than 11 days, intermediate Saturdays, Sundays, and legal holidays shall be excluded in the computation. As used in this rule and in Rule 77(c), "legal holiday" includes New Year's Day, Birthday of Martin Luther King, Jr., Washington's Birthday, Memorial Day, Independence Day, Labor Day, Columbus Day, Veterans Day, Thanksgiving Day, Christmas Day, and any other day appointed as a holiday by the President or the Congress of the United States, or by the state in which the district court is held.

(b) Enlargement. When by these rules or by a notice given thereunder or by order of court an act is required or allowed to be done at or within a

specified time, the court for cause shown may at any time in its discretion (1) with or without motion or notice order the period enlarged if request therefor is made before the expiration of the period originally prescribed or as extended by a previous order, or (2) upon motion made after the expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect; but it may not extend the time for taking any action under Rules 50(b) and (c)(2), 52(b), 59(b), (d) and (e), and 60(b), except to the extent and under the conditions stated in them.

[(c) Unaffected by Expiration of Term.] (Rescinded Feb. 28, 1966, eff. July 1, 1966)

(d) For Motions--Affidavits. A written motion, other than one which may be heard ex parte, and notice of the hearing thereof shall be served not later than 5 days before the time specified for the hearing, unless a different period is fixed by these rules or by order of the court. Such an order may for cause shown be made on ex parte application. When a motion is supported by affidavit, the affidavit shall be served with the motion; and, except as otherwise provided in Rule 59(c), opposing affidavits may be served not later than 1 day before the hearing, unless the court permits them to be served at some other time.

(e) Additional Time After Service by Mail. Whenever a party has the right or is required to do some act or take some proceedings within a prescribed period after the service of a notice or other paper upon the party and the notice or paper is served upon the party by mail, 3 days shall be added to the prescribed period.

Rule 12. Defenses and Objections—

When and How Presented--By Pleading or Motion--Motion for Judgment on the Pleadings

(a) When Presented.

(1) Unless a different time is prescribed in a statute of the United States, a defendant shall serve an answer

(A) within 20 days after being served with the summons and complaint, or

(B) if service of the summons has been timely waived on request under Rule 4(d), within 60 days after the date when the request for waiver was sent, or within 90 days after that date if the defendant was addressed outside any judicial district of the United States.

(2) A party served with a pleading stating a cross-claim against that party shall serve an answer thereto within 20 days after being served. The plaintiff shall serve a reply to a counterclaim in the answer within 20 days after service of the answer, or, if a reply is ordered by the court, within 20 days after service of the order, unless the order otherwise directs.

(3)(A) The United States, an agency of the United States, or an officer or employee of the United States sued in an official capacity, shall serve an answer to the complaint or cross-claim--or a reply to a counterclaim--within 60 days after the United States attorney is served with the pleading asserting the claim.

(B) An officer or employee of the United States sued in an individual capacity for acts or omissions occurring in connection with the performance of duties on behalf of the United States shall serve an

answer to the complaint or cross-claim--or a reply to a counterclaim--within 60 days after service on the officer or employee, or service on the United States attorney, whichever is later.
(4) Unless a different time is fixed by court order, the service of a motion permitted under this rule alters these periods of time as follows:
(A) if the court denies the motion or postpones its disposition until the trial on the merits, the responsive pleading shall be served within 10 days after notice of the court's action; or
(B) if the court grants a motion for a more definite statement, the responsive pleading shall be served within 10 days after the service of the more definite statement.
(b) How Presented. Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) improper venue, (4) insufficiency of process, (5) insufficiency of service of process, (6) failure to state a claim upon which relief can be granted, (7) failure to join a party under Rule 19. A motion making any of these defenses shall be made before pleading if a further pleading is permitted. No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion. If a pleading sets forth a claim for relief to which the adverse party is not required to serve a responsive pleading, the adverse party may assert at the trial any defense in

law or fact to that claim for relief. If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

(c) Motion for Judgment on the Pleadings. After the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings. If, on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

(d) Preliminary Hearings. The defenses specifically enumerated (1)-(7) in subdivision (b) of this rule, whether made in a pleading or by motion, and the motion for judgment mentioned in subdivision (c) of this rule shall be heard and determined before trial on application of any party, unless the court orders that the hearing and determination thereof be deferred until the trial.

(e) Motion for More Definite Statement. If a pleading to which a responsive pleading is permitted is so vague or ambiguous that a party cannot reasonably be required to frame a responsive pleading, the party may move for a more definite statement before

interposing a responsive pleading. The motion shall point out the defects complained of and the details desired. If the motion is granted and the order of the court is not obeyed within 10 days after notice of the order or within such other time as the court may fix, the court may strike the pleading to which the motion was directed or make such order as it deems just.

(f) Motion To Strike. Upon motion made by a party before responding to a pleading or, if no responsive pleading is permitted by these rules, upon motion made by a party within 20 days after the service of the pleading upon the party or upon the court's own initiative at any time, the court may order stricken from any pleading any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter.

(g) Consolidation of Defenses in Motion. A party who makes a motion under this rule may join with it any other motions herein provided for and then available to the party. If a party makes a motion under this rule but omits therefrom any defense or objection then available to the party which this rule permits to be raised by motion, the party shall not thereafter make a motion based on the defense or objection so omitted, except a motion as provided in subdivision (h)(2) hereof on any of the grounds there stated.

(h) Waiver or Preservation of Certain Defenses.

(1) A defense of lack of jurisdiction over the person, improper venue, insufficiency of process, or insufficiency of service of process is waived (A) if omitted from a motion in the circumstances described in subdivision (g), or (B) if it is neither made by motion under this rule nor included in a

responsive pleading or an amendment thereof permitted by Rule 15(a) to be made as a matter of course.

(2) A defense of failure to state a claim upon which relief can be granted, a defense of failure to join a party indispensable under Rule 19, and an objection of failure to state a legal defense to a claim may be made in any pleading permitted or ordered under Rule 7(a), or by motion for judgment on the pleadings, or at the trial on the merits.

Rule 15. Amended and Supplemental Pleadings

(a) Amendments. A party may amend the party's pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, the party may so amend it at any time within 20 days after it is served. Otherwise a party may amend the party's pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires. A party shall plead in response to an amended pleading within the time remaining for response to the original pleading or within 10 days after service of the amended pleading, whichever period may be the longer, unless the court otherwise orders.

Rule 26. General Provisions Governing Discovery; Duty of Disclosure

(a) Required Disclosures; Methods to Discover Additional Matter.

(1) *Initial Disclosures.* Except in categories of proceedings specified in Rule 26(a)(1)(E), or to the extent otherwise stipulated or directed by order, a party must, without awaiting a discovery request, provide to other parties:

(A) the name and, if known, the address and telephone number of each individual likely to have discoverable information that the disclosing party may use to support its claims or defenses, unless solely for impeachment, identifying the subjects of the information;

(B) a copy of, or a description by category and location of, all documents, data compilations, and tangible things that are in the possession, custody, or control of the party and that the disclosing party may use to support its claims or defenses, unless solely for impeachment;

(C) a computation of any category of damages claimed by the disclosing party, making available for inspection and copying as under Rule 34 the documents or other evidentiary material, not privileged or protected from disclosure, on which such computation is based, including materials bearing on the nature and extent of injuries suffered; and

(D) for inspection and copying as under Rule 34 any insurance agreement under which any person carrying on an insurance business may be liable to satisfy part or all of a judgment which may be entered in the action or to indemnify or reimburse for payments made to satisfy the judgment.

(2) *Disclosure of Expert Testimony.*

(A) In addition to the disclosures required by paragraph (1), a party shall disclose to other parties

the identity of any person who may be used at trial to present evidence under Rules 702, 703, or 705 of the Federal Rules of Evidence.

(B) Except as otherwise stipulated or directed by the court, this disclosure shall, with respect to a witness who is retained or specially employed to provide expert testimony in the case or whose duties as an employee of the party regularly involve giving expert testimony, be accompanied by a written report prepared and signed by the witness. The report shall contain a complete statement of all opinions to be expressed and the basis and reasons therefor; the data or other information considered by the witness in forming the opinions; any exhibits to be used as a summary of or support for the opinions; the qualifications of the witness, including a list of all publications authored by the witness within the preceding ten years; the compensation to be paid for the study and testimony; and a listing of any other cases in which the witness has testified as an expert at trial or by deposition within the preceding four years.

(C) These disclosures shall be made at the times and in the sequence directed by the court. In the absence of other directions from the court or stipulation by the parties, the disclosures shall be made at least 90 days before the trial date or the date the case is to be ready for trial or, if the evidence is intended solely to contradict or rebut evidence on the same subject matter identified by another party under paragraph (2)(B), within 30 days after the disclosure made by the other party. The parties shall supplement these disclosures when required under subdivision (e)(1).

(b) Discovery Scope and Limits. Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows:

(1) *In General.* Parties may obtain discovery regarding any matter, not privileged, that is relevant to the claim or defense of any party, including the existence, description, nature, custody, condition, and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. For good cause, the court may order discovery of any matter relevant to the subject matter involved in the action. Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence. All discovery is subject to the limitations imposed by Rule 26(b)(2)(i), (ii), and (iii).

(2) *Limitations.* By order, the court may alter the limits in these rules on the number of depositions and interrogatories or the length of depositions under Rule 30. By order or local rule, the court may also limit the number of requests under Rule 36. The frequency or extent of use of the discovery methods otherwise permitted under these rules and by any local rule shall be limited by the court if it determines that: (i) the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive; (ii) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or (iii) the burden or expense of the proposed discovery outweighs its likely benefit,

taking into account the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the litigation, and the importance of the proposed discovery in resolving the issues. The court may act upon its own initiative after reasonable notice or pursuant to a motion under Rule 26(c).

Rule 26 (b)(2)(B) New Rule

(B) A party need not provide discovery of electronically stored information from sources that the party identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the party from whom discovery is sought must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(2)(C). The court may specify conditions for the discovery.

Rule 41. Dismissal of Actions

(b) Involuntary Dismissal: Effect Thereof. For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against the defendant. Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction, for improper venue, or for failure to join a party under Rule 19, operates as an adjudication upon the merits.

Rule 55. Default

(a) Entry. When a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend as provided by these rules and that fact is made to appear by affidavit or otherwise, the clerk shall enter the party's default.

(b) Judgment. Judgment by default may be entered as follows:

(1) *By the Clerk.* When the plaintiff's claim against a defendant is for a sum certain or for a sum which can by computation be made certain, the clerk upon request of the plaintiff and upon affidavit of the amount due shall enter judgment for that amount and costs against the defendant, if the defendant has been defaulted for failure to appear and is not an infant or incompetent person.

(2) *By the Court.* In all other cases the party entitled to a judgment by default shall apply to the court therefor; but no judgment by default shall be entered against an infant or incompetent person unless represented in the action by a general guardian, committee, conservator, or other such representative who has appeared therein. If the party against whom judgment by default is sought has appeared in the action, the party (or, if appearing by representative, the party's representative) shall be served with written notice of the application for judgment at least 3 days prior to the hearing on such application. If, in order to enable the court to enter judgment or to carry it into effect, it is necessary to take an account or to determine the amount of damages or to establish the truth of any averment by evidence or to make an investigation of any other matter, the court may conduct such hearings or order such references

as it deems necessary and proper and shall accord a right of trial by jury to the parties when and as required by any statute of the United States.

(c) Setting Aside Default. For good cause shown the court may set aside an entry of default and, if a judgment by default has been entered, may likewise set it aside in accordance with Rule 60(b).